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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY VALDOVINOS, Defendant and Appellant.	C085979 (Super. Ct. No. 16FE022074)

A jury found defendant Johnny Valdovinos guilty of receiving a stolen vehicle. On appeal, he contends he was denied his due process right to testify and present a defense when the trial court struck his explanation for why he had not named the woman who purportedly loaned him the stolen vehicle. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Stolen RAV4

The victim stepped out of her 2016 Toyota RAV4 with the engine running, to drop off something inside her mother's home. She was inside for no more than three minutes and came back to see her RAV4 being driven away. She could not see the driver.

An officer tracked the RAV4's LoJack signal to a small parking area. Defendant was standing on the sidewalk about 10 yards from the RAV4. Defendant appeared to be talking on his cell phone.

Once backup arrived, the officer approached defendant and asked to whom the RAV4 belonged. Defendant said it belonged to a friend who was inside a nearby apartment. The officer asked the friend's name. When defendant could not provide a name, the officer handcuffed him and took him to the squad car.

Inside the squad car, a recording system captured some of defendant's statements, which were later played for the jury. They included defendant telling the officer: "This morning um, off the record, I, I can't—I wish I could give you that help to fuckin' save me from my ass. But fuck, savin' myself from my—like, me not havin' an idea, but goin' along with it." He also mentioned "that stupid broad," and said, "You haven't seen exactly the driver? Huh?" and "Shit ain't mine. (Unintelligible) take the rap for it."

Defendant Testifies

At trial, defendant testified that he first saw the RAV4 in the early morning, as he was leaving his grandmother's house. A woman was driving it. Defendant waved to the woman, and she said, "What's up?" Defendant asked if she smoked. She said yes, and they hung out the whole day. At some point, she said she had to go to court. Defendant said he would go too. He dropped her off in front of the courthouse. She had asked him

to park the car, so he drove a few blocks away to say hi to a buddy. He called the buddy but got no answer.

Defendant testified that when the officer told him the RAV4 was stolen, he "[v]ery much" wanted to tell the officer the woman's name but he "was scared to." He explained: "[o]nce [I'm] a snitch, that is bad. My life can be in danger. My family, I just might as well run to a different state." "Telling on somebody and looking like . . . I told on somebody . . . people don't like that. And . . . there's repercussions behind that. So I'm 40 years old, and I've gotten in trouble before, and I just got to keep quiet." He added that when he said, "I wish I could give you that help so I could fucking save me from my ass," he meant he wished he could have told the officer who the woman was.

Defense counsel then asked defendant why it was no longer snitching to testify to the woman's name in court:

"[DEFENSE COUNSEL]: What's different now?

"[DEFENDANT]: What's different? You just asked me that in your office.

"[DEFENSE COUNSEL]: I did, and I want to know. What is different now?

"[DEFENDANT]: That I know her name now. She just came yesterday to tell you guys—everybody knows her name now but them.

"[DEFENSE COUNSEL]: Okay. Is saying her name now not snitching somehow?

"[DEFENDANT]: No, because she's already came forward and said it. And now I'm not telling you because she came in here yesterday and—"

The prosecutor objected on speculation grounds, and the trial court sustained the objection. It then struck defendant's answer beginning with "that I know" and admonished the jury to disregard the statement.

The Woman Comes to Court

Shortly before opening statements, and outside the jury's presence, the trial court had explained that a potential exculpatory witness was in the audience. The court said it had been represented that she may testify that she had picked up defendant in the stolen vehicle. The court noted the woman may need counsel relative to her Fifth Amendment privileges. The trial court arranged for counsel and ordered her to return in the afternoon. Appointed counsel thereafter instructed the woman to invoke her Fifth Amendment protection. The trial court then released her from her obligation to appear.

The following morning, however, the woman returned and handed the trial court a signed note which was read into the record. In pertinent part, it said: "I appeared in court yesterday, as you appointed an attorney to represent me yesterday. However, my attorney did not explain what I wanted, only my best interests. [Defendant] had no knowledge of the vehicle he was driving was stolen." The woman, however, soon confirmed she was invoking her Fifth Amendment right not to testify, and she was again dismissed.

Trial Court Strikes Defendant's Testimony But Permits an Alternative Testimony

After the trial court struck defendant's testimony referencing how the woman had said her name in court, an in-chambers discussion was held. The court noted they were unable to fashion a remedy, and the prosecution was considering seeking a mistrial.[1]

Later, the court explained it could not put the entirety of defendant's comments before the jury. Under Evidence Code section 352,[2] "the probative value for what you want it for is significantly and substantially outweighed by the prejudice of putting the

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[1] The prosecution ultimately opted not to request a mistrial.

[2] Undesignated statutory references are to the Evidence Code.

jury in possession of two or three statements that they have no idea what they're supposed to do with, no idea what happened and how it happened and what the content of what [the woman]'s statements would have been."

But following another in-chambers discussion, defendant was permitted to testify as follows:

"[DEFENSE COUNSEL]: "Do you remember on Thursday, you testified that the name of the girl who picked you up in the car was [counsel states the woman's name]?

"[DEFENDANT]: Yes, I remember.

"[DEFENSE COUNSEL]: Okay. And is the reason why you felt comfortable telling everybody her name on Thursday because in between when you were arrested and when you testified on Thursday, her name became known to the system?

"[DEFENDANT]: Yes, that's why I said her name.

"[DEFENSE COUNSEL]: Okay. So that you weren't the first person who was identifying her as being connected here?

"[DEFENDANT]: No, no."

Defendant's Closing

At closing, defense counsel argued that defendant had no reason to believe the RAV4 was stolen: "if [defendant] said he knew [the woman] from around the way, he had known her for a long time, or he knew her to be destitute or something like that, then maybe yeah, you'd have reason to think like, how's she showing up with this 2016 car. [¶] But really, when you see a girl and you think she's kind of cute, and she indicates that she's down to party, and you're hoping you might get laid later, you're really going to insult that person by asking a bunch of questions about, 'Hey, is this really—really your car? Sure this thing isn't stolen?' " Counsel noted the RAV4 had the original key and had no damage consistent with being stolen.

Counsel also addressed defendant's fear of being labeled a snitch: "[S]omebody who has been convicted of felonies is going to be in tune with the idea that he can't snitch on somebody."

Jury Verdict and Sentencing

The jury found defendant guilty of receiving a stolen vehicle. (Pen. Code, § 496d, subd. (a).) But it acquitted him of unlawfully driving a vehicle (Veh. Code, § 10851, subd. (a)) as well as fraudulent possession of stolen identity (Pen. Code, § 530.5, subd. (c)(1)). The trial court found defendant had three prior convictions. (Pen. Code, § 667.5, subd. (b).)

The trial court imposed a five-year aggregate term: the two-year middle term for receiving a stolen vehicle, along with three one-year terms for the prison priors. (Pen. Code, § 667.5, subd. (b).) The court then split the term, imposing 18 months of custody and suspending the remainder for mandatory supervision.

DISCUSSION

On appeal, defendant contends he was denied his due process right to testify and present a defense when the trial court struck his explanation for why he had not named the woman who loaned him the stolen RAV4. He also contends excluding the testimony under section 352 was an abuse of discretion. He argues it was integral to the defense to say he had a reason, other than consciousness of guilt, for naming a person he had previously refused to name when arrested. And had he been allowed to explain his reaction to seeing the woman in court, the jury may well have acquitted him entirely. We cannot agree.

The crux of the defense was that defendant got in the RAV4 not knowing it was stolen. And once he discovered it was stolen, he failed to explain his situation to the officer because he feared being labeled a snitch. The trial court's ruling did not prevent

the defense from offering that defense. Indeed, defendant testified a woman picked him up in the RAV4, and they "hung out." Later, when an officer told him it was stolen, defendant testified he wanted to say the woman's name but feared being labeled a snitch. That testimony was bolstered by defendant's recorded statements: "I wish I could give you that help to fuckin' save me from my ass," "that stupid broad," "Shit ain't mine," "You haven't seen exactly the driver? Huh?"

Defense counsel echoed that defense at closing, arguing defendant did not know the car was stolen: "[W]hen you see a girl and you think she's kind of cute, and she indicates that she's down to party, and you're hoping you might get laid later, you're really going to insult that person by asking . . . 'Sure this thing isn't stolen?' " Counsel noted nothing indicated the RAV4 was stolen. And counsel argued that defendant's past had taught him the dangers of snitching.

The testimony at issue on appeal goes to the nuance of precisely why defendant felt free to name the woman in court but not while he was arrested. Defendant wished to say that the woman had provided her name: "[B]ecause she's already c[o]me forward and said it." Instead, he was limited to saying, "her name became known to the system," and he was not the first to identify her as being connected to the case. While minor differences exist between defendant's preferred version and the version allowed, we do not believe the differences rise to the level of depriving defendant his due process right to a defense. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense"].)

For the same reason, we conclude that even assuming error in excluding the testimony under section 352, it was harmless. (See *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [§ 352 does not implicate the federal Constitution, and allegations of error

are reviewed under *People v. Watson* (1956) 46 Cal.2d 818].)[3] Again, too fine a distinction exists between defendant's preferred testimony and the testimony he was allowed to give to say that there was a reasonable probability of a more favorable outcome absent any assumed error.

In sum, defendant was not denied his right to present a defense, and even assuming the evidence was erroneously excluded under section 352, it was harmless.

DISPOSITION

The judgment is affirmed.

s/BUTZ, Acting P. J.

We concur:

s/DUARTE, J.

s/RENNER, J.

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3 Defendant cites to Justice Kennard's dissent in *People v. Cudjo* (1993) 6 Cal.4th 585, 637 (dis. opn. of Kennard, J.), to argue the federal harmless error standard applies. But absent further direction from the high court, we are constrained to follow the majority's conclusion that the *Watson* standard applies. (*Cudjo*, at p. 612 [declining to extend federal constitutional scrutiny to the exclusion of testimony as proposed by the dissent].)